

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Judge George N. Leighton
U. S. District Court

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ATARI, INC.,
a Delaware corporation, and

MIDWAY MFG. CO.,
an Illinois corporation,

Plaintiffs,

vs.

NORTH AMERICAN PHILIPS CONSUMER
ELECTRONICS CORP.,
a Tennessee corporation, and

PARK TELEVISION d/b/a/ PARK
MAGNAVOX HOME ENTERTAINMENT
CENTER,
an Illinois partnership,

Defendants.

Civil Action No.

81 C 6434

Judge Leighton

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

1. Plaintiff Atari, Inc., is a Delaware corporation having its principal place of business in Sunnyvale, California. Atari is a leading developer and manufacturer of home video games and personal computers. Atari markets and sells video games to dealers and distributors, upon which Atari is dependant for sales to consumers.

2. Plaintiff Midway Mfg. Co., is an Illinois corporation having its principal place of business in Franklin Park, Illinois. Midway is a leading developer and manufacturer of coin-operated video games. Midway's coin-operated video games

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are placed for public use in a wide variety of public places, such as arcades, bars, hotels, shopping centers, retail stores, and restaurants.

3. Defendant North American Philips Consumer Electronics Corp. is a Tennessee corporation having its principal place of business in Knoxville, Tennessee. North American manufactures, advertises, distributes and sells home video games.

4. Defendant Park Television, d/b/a Park Magnavox Home Entertainment Center, is an Illinois partnership having its principal place of business in Evergreen Park, Illinois. Park is a retailer of audio visual equipment, including home video games marketed by North American such as the "K.C. Munchkin" game at issue in this proceeding.

5. The "Pac-Man" video game was created by Namco, Limited, a Japanese company, in 1980. Namco assigned the copyright in the "Pac-Man" game in the United States to Midway by an "Assignment of Copyright," dated October 10, 1980 and recorded in the United States Copyright office. The Register of Copyrights issued Midway a Certificate of Registration for the "Pac-Man Audiovisual Work," Reg. No. PA 83-768, effective November 13, 1980. Midway owns the United States copyright to the "Pac-Man" audiovisual work.

6. By agreement effective April 27, 1981, Midway granted Namco-America, Inc. an exclusive license under the "Pac-Man" copyright and trademark for home video and personal computer use. By a contemporaneous agreement Namco-America

granted to Atari the exclusive right in the United States and its territories in the copyright and trademark for the "Pac-Man" audiovisual work for home video games and personal computers, including exclusive rights under Certificate of Registration No. 83-768. The agreement transferring to Atari the exclusive rights under the "Pac-Man" copyright was filed with the Copyright Office for recordation on November 12, 1981.

7. Midway has extensively advertised and promoted the "Pac-Man" video game. Thousands of full-color brochures containing explicit pictorial and graphic representations of the visual elements of the game have been distributed throughout the United States to advertise and promote the game. Midway has caused "Pac-Man" advertisements to appear in trade magazines and has issued numerous press releases concerning the "Pac-Man" game. Midway also has displayed and promoted "Pac-Man" at national and local trade shows.

8. Since October 31, 1980, Midway has sold in excess of 75,000 "Pac-Man" video games throughout the United States at a wholesale value in excess of \$150,000,000. Each "Pac-Man" video game sold by Midway contains a notice of Midway's claim of copyright.

9. The "Pac-Man" game has achieved widespread popularity among members of the public. The "Pac-Man" game has been the subject of a substantial number of unsolicited news reports and has been featured on numerous television programs, such as NBC Nightly News, "Two on Two" broadcast on WBBM television in Chicago, and "20/20", an ABC Television show. An

opinion poll entitled "The Players' Choice" published in the November, 1981 issue of Replay Magazine ranks "Pac-Man" as second among upright coin-operated video games in earnings. Replay is widely circulated in the video game industry, and the results of its regularly published poll are relied upon as a general indication of popularity of a video games by those in the industry. In addition, Video Magazine and Electronic Games Magazine have commended "Pac-Man" as the 1981 "Game Of The Year".

10. Because of the popularity of the "Pac-Man" game and the demand for a home version of this unique game, Atari negotiated an exclusive license under copyright in the United States for home video and personal computer use of the "Pac-Man" video game. "Pac-Man" represents a considerable investment for Atari. Atari has paid a substantial license fee and is obligated to pay substantial royalties for its exclusive license of the "Pac-Man" video game. Atari has expended in excess of One and One-half Million Dollars in licensing, developing, and advertising its "Pac-Man" home video game.

11. The "Pac-Man" electronic video game is essentially a maze-chase game. However, numerous unique and intriguing elements which have never before been incorporated in a video game have made the "Pac-Man" video game the most popular and successful maze-chase game ever devised. The "Pac-Man" game incorporates a blue maze that covers almost the entire video screen. By manipulation of a single handle control, the player guides a "gobbler" player symbol (called the "Pac-Man")

through the maze. A significant feature of the maze, called "wraparound" or "scrolling," allows the gobbler to exit through an opening or "tunnel" in the maze at one edge of the screen and to re-enter at the opposite edge in order to attempt to evade opponents. The gobbler, which was never used in a video game before "Pac-Man", is represented by a generally circular yellow figure with a pie-shaped wedge which opens and closes in a mouth-like fashion. Several ghost monsters enter the maze from its center and move through the maze under the pre-programmed control of the game computer. Each of the ghost monsters is a different color (red, orange, etc.) having two eyes and tiny feet. If the gobbler figure encounters a ghost monster, it is deflated and leaves the screen with a small star-burst.

12. The object of the game is for the player to score points by causing the gobbler to munch up as many items within the maze as possible before the gobbler is caught and deflated by one of the ghost monsters. The maze contains dots and the player scores points for each dot munched. The player may also earn extra points by munching special larger, flashing dots called "power capsules," one of which is located near each corner of the maze. The power capsule, when munched, not only scores extra points but causes the ghost monsters to turn blue for a brief time period. While the ghost figures are blue, the gobbler can munch them to earn bonus points. After a ghost is munched, its eyes return to the center of the maze, its body is regenerated and (after a short delay) once again enters the maze. Just before the ghost figures change from blue back to

their normal colors, signifying they can no longer be munched by the gobbler, they warn the player by flashing rapidly.

13. If the gobbler successfully munches all the dots in a maze, the entire mazes flashes several times, and a fresh maze with dots appears. The game play continues for another round with the game difficulty increased because the gobbler and its ghost opponents all move faster. Audio and musical effects accompany the game play.

14. The appearance, characters, sequence of play, scoring, and strategy of North American's "K.C. Munchkin" game are virtually identical to corresponding aspects of the "Pac-Man" game. Even the name "Munchkin" was copied; the advertising literature for "Pac-Man" refers to "Pac-Man's" gobbler figure as "munching" up the obstacles in its path.

Graphic Appearance

Each game comprises a blue maze with substantially the same paths and obstacles. The characters appearing in the maze look the same, have virtually the same shape and color, and move through the maze in the same fashion. Almost every graphic feature looks substantially the same; and the static components, flash sequences, color changes, and character movements are all virtually identical.

Characters

Each game has as its principal character the unique gobbler figure introduced by "Pac-Man", ghost opponents, dots, special flashing dots (power capsules), and a rectangular "homing" point at the center of the maze.

Play

In each game the player controls the movement of the gobbler figure through the maze with a single lever control. The gobbler eats dots and power capsules as it encounters them. Ghost opponents travel through the maze chasing the gobbler, which if captured deflates and leaves the screen in a short star-burst. Ghosts change color to blue for a brief time after a power capsule is eaten, enabling them to be eaten by the gobbler. If eaten, the ghosts lose their color but their eyes return to the homing box at the center of the maze, are regenerated, and return to the play. The gobbler can exit one side of the maze through a tunnel and reappear in a corresponding tunnel on the opposite side of the maze. When all the dots are eaten, the maze flashes, a fresh maze with dots appears, and play continues at successive increments of speed until the gobbler is deflated by a ghost.

Scoring

Points are scored in each game by munching dots within the maze, with extra points earned for munching power capsules. Bonus points can be scored by munching a ghost when it turns blue after a power capsule is eaten. Additional points are scored in fresh rounds earned when all the dots in the maze are eaten.

Strategy

To score the largest number of points, in each game the gobbler must be moved through the maze eating as many dots

three ghost monsters in "K.C. Munchkin" instead of the four in the "Pac-Man" game; and (4) the center of the maze in the "Pac-Man" game is a fixed rectangular box whereas it rotates in "K.C. Munchkin." Minor differences also exist in some of the colors and sounds accompanying the games.

16. The market for home video game software is highly competitive, and new games are constantly being introduced replacing older less sophisticated games. The life cycle of a home video game is relatively short, typically between one and two years. The peak earnings period of a home video game typically lasts from three to six months after the introduction of the game to the market. This period is crucial to the success of the game and the manufacturer's ability to recover its investment.

17. North American had access to the "Pac-Man" game and, recognizing the wide-spread popularity and great demand for a home version of the "Pac-Man" game, North American sought a license under the "Pac-Man" copyright from Midway. However, Midway told North American that home video rights under the "Pac-Man" copyright had previously been licensed to Atari. Nevertheless, North American made a conscious decision to proceed with the manufacture and sale of its copy of the "Pac-Man" game under the name "K.C. Munchkin."

18. Atari has commenced marketing its Atari "Pac-Man" home video game to dealers, distributors, and the public. Full page color advertisements for the Atari "Pac-Man" video game have appeared in Time and Newsweek magazines. Atari has already

received over one million orders for the Atari "Pac-Man" game from dealers and distributors. Shipments of the Atari "Pac-Man" game are scheduled to commence in early 1982.

19. North American's "K.C. Munchkin" home video game is directed toward the same market as Atari's "Pac-Man" home video game. North American's introduction of "K.C. Munchkin" has preempted the market for Atari's exclusively licensed "Pac-Man" and the prospects for successfully introducing the "Pac-Man" game to the home video game market will be significantly diminished. Atari's market loss due to the introduction of "K.C. Munchkin" cannot be measured. Atari's injury is irreparable.

20. Orders from dealers and distributors for Atari's "Pac-Man" to be delivered in 1982 are cancellable and are in jeopardy if infringement by the "K.C. Munchkin" game is not halted. Moreover, loss of sales of the Atari "Pac-Man" to "K.C. Munchkin" will also result in loss of associated sales of Atari's home video computer hardware because customers will have purchased the directly competitive but incompatible Odyssey II hardware sold by defendants. Atari will also lose the prestige and good will upon which its business is based if a competitor is permitted to continue marketing the most popular video game product of 1981 which is exclusively licensed to Atari.

21. North American is sponsoring a nationwide advertising, distribution and sales campaign for "K.C. Munchkin." This campaign includes full page color advertising in several

national magazines. Currently, only small numbers of the game have been released to test the market. North American intends to flood the pre-Christmas market with thousands "K.C. Munchkin" games beginning December 1, 1981.

22. Distributors and retailers such as defendant Park are currently participating in North American's marketing effort, selling and taking orders for the "K.C. Munchkin" video game. Distributors and retailers have been palming off "K.C. Munchkin" as "a Pac-Man type game"; "just like Pac-Man"; and "Odyssey's Pac-Man." Such palming off of "K.C. Munchkin" establishes beyond peradventure the substantial similarities between "K.C. Munchkin" and "Pac-Man" and has caused and is causing confusion and deception of consumers. This confusion has and is currently substantially damaging Atari's ability to successfully introduce and market its licensed "Pac-Man" home video game.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action and venue is proper.

2. Plaintiffs have established that they will probably succeed on the merits of their copyright infringement and unfair competition claims.

3. Plaintiffs' copyrights in the "Pac-Man" video game and audiovisual work are valid, as evidenced by Certificate of Registration No. PA 83-768, effective November 13, 1980.

4. Defendant North American had notice of the copyright; nevertheless North American unlawfully copied the copyrighted "Pac-Man" work. The similarities between the "Pac-Man" work and defendants "K.C. Munchkin" game are so striking that a finding of independent creation or development is precluded, and copying may properly be inferred.

5. North American conceded access to the copyrighted "Pac-Man" audiovisual work. In addition, North American had numerous opportunities to view the copyrighted "Pac-Man" audiovisual work since there are over 75,000 coin-operated models currently in the market and "Pac-Man" has been widely publicized and advertised within the video game industry and among the general public and media as well.

6. A detailed comparison of the games proves that "K.C. Munchkin" is substantially similar, if not virtually identical, to the copyrighted "Pac-Man" audiovisual work in graphic appearance, characters, manner and sequence of play, method of scoring, and strategy of play.

7. Despite some minor differences in the games, an ordinary observer would find the overall appearance, characters, manner and sequence of play, method of scoring, and strategy of play of "K. C. Munchkin" to be substantially similar to the copyrighted "Pac-Man" audiovisual work and would reasonably conclude that the "K.C. Munchkin" game had been derived and copied from "Pac-Man."

8. The "K.C. Munchkin" game is substantially similar to the "Pac-Man" work. Thus, infringement of plaintiff's

copyrights by the manufacture, distribution, sale, display, and performance of "K.C. Munchkin" by defendants has been proven.

9. Proof of copyright infringement creates a presumption that the holder of exclusive rights under the copyright will suffer irreparable harm. In addition, plaintiffs here have demonstrated that they will suffer irreparable injury if defendants and all those in concert with them are not preliminarily enjoined from manufacturing, distributing, or selling the "K.C. Munchkin" game or any game which infringes plaintiffs' copyrights.

10. North American's introduction, advertising, distribution and sales of "K.C. Munchkin" have preempted the home video market for Atari's authorized "Pac-Man" home video game causing Atari irreparable harm.

11. North American's introduction, advertising, distribution and sale of "K.C. Munchkin" is irreparably damaging Atari's substantial investment of time and money in acquiring the exclusive home video rights to the "Pac-Man" audiovisual work and its development of the Atari "Pac-Man" home video game. It also irreparably damages the reputation and goodwill of Midway's copyrighted "Pac-Man" coin-operated game.

12. Balanced against the harm to the infringing defendants if an injunction is issued, the harm which will be suffered by the plaintiffs if issuance of a preliminary injunction is denied is significantly greater. A preliminary injunction is also necessary and appropriate to protect the public

interest in copyrighted works, the copyright system's incentives for creation as opposed to imitation and copying, and the health of the video game industry.

13. As an independent basis for granting injunctive relief, plaintiffs have proven a substantial likelihood of success on the merits of their unfair competition claim. Defendants are guilty of palming off the infringing "K.C. Munchkin" game as plaintiffs' "Pac-Man" game, giving rise to a likelihood of consumer confusion and unfair and deceptive trade practices.

14. North American has engaged in contributory infringement by advertising the infringing "K.C. Munchkin" game and providing distributors and retailers with the instrumentality with which to infringe Atari's exclusive rights under the "Pac-Man" copyright.

15. Defendants' direct and indirect activities in connection with the sale and marketing of the "K.C. Munchkin" game constitute deceptive trade practices under Ill.Rev.Stat., Ch.121 1/2 §312 and unfair competition under the common law. Preliminary injunctive relief as requested by plaintiffs is appropriate here, pursuant to Ill.Rev.Stat., Ch.121 1/2 §313 and Rule 65, Fed. R. Civ.P.

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